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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060436
Party	Defendant Creditera
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Attachments	21212 - Opposition Motion to Strike.pdf(54004 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Cortera, Inc.	)	
	)	
	)	
Petitioner,	)	
	)	
	)	
v.	)	**Cancellation No. 92060436**
	)	
	)	**Registration No. 4363923**
Creditera	)	
	)	
Registrant,	)	
	)	
_____	)	

REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

For the reasons set forth below, and pursuant to Federal Rules of Civil Procedure 8(c) and 12(f), Creditera ("Registrant") moves to dismiss and opposes Petitioner's motion to strike.

A. Registrant's First Affirmative Defense: No Likelihood of Confusion

The entire basis for Petitioner's argument to strike Respondent's first affirmative defense seems to hinge on the conflation of denials of Petitioner's allegations contained in the Answer with presenting an affirmative defense. The two things cannot, however, be conflated, as one is not determinative of nor dependant on the other. If Petitioner's allegations as presented in their Petition are found to be wanting, their claim fails regardless of the existence of any affirmative defense.

Likewise, even if their allegations are found to be true but the affirmative defense is found to be persuasive, their claim also fails even though the denials in the Answer were not effective. Indeed, Petitioner's own recitation of the relevant law compels such as conclusion and validates a ruling maintaining Respondent's pleading of affirmative defenses.

In Petitioner's Motion, Petitioner adequately presents particular aspects of the fundamental law concerning pleading affirmative defenses, their nature and purpose. *See* Dkt 5, II. For example, Petitioner is correct in stating that "all affirmative defenses must therefore include sufficient detail to give the opposing party fair notice of the basis for each defense. *Cf. McDonnell Douglas Corp. v. National Data Corp.,* 228 U.S.P.Q. 45, 47 (T.TA.B. 1985)." Dkt 5, IIA. Also, "an affirmative defense is an 'assertion raising new facts and arguments that if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.' *Saks v. Franklin Covey Co.,* 316 F.3d 337,350 (2nd Cir. 2003) (quoting Black's Law Dictionary 430 (7th ed. 1999))." *Id.* Petitioner even correctly and helpfully indicates that "'An affirmative defense assumes the allegations in the complaint to be true but, nevertheless, constitutes a defense to the allegations in the complaint. **An affirmative defense does not negate the elements of a cause of action; it is an explanation that bars the claim**.' *Blackhorse v. Pro Football, Inc.,* 98 U.S.P.Q.2d 1633, * 12 eLr.A.B. 2011)." *Id.* (Emphasis added).

As is clearly indicated by the Board in *Blackhorse*, an affirmative defense is not a denial of the allegations in the petition, rather, it is a separate explanation. As such, denying the basis for the claim in the Answer does not preclude the opportunity to provide an "assertion raising new facts and arguments that if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true" in the form of an affirmative defense. *Saks v. Franklin Covey Co.,* 316 F.3d 337,350 (2nd Cir. 2003) (quoting Black's Law Dictionary 430 (7th ed. 1999))."

The statements contained in ¶¶ 18-28 of the Answer (Dkt 4) are a reflection of the well settled *Dupont Factors* as set forth by The Court of Appeals for the Federal Circuit to aide in

determining the likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 (USPQ 563 (CCPA 1973). These factors are material to the determination of likelihood of confusion, and are well established. Each of the statements contained in ¶¶ 18-28 of the Answer are probative of the DuPont Factors and are material to the issue at hand, and are plainly "assertion[s] raising new facts and arguments that if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Saks v. Franklin Covey Co.,* 316 F.3d 337,350 (2nd Cir. 2003) (quoting Black's Law Dictionary 430 (7th ed. 1999)).

Thus, Respondent's first affirmative defense of no likelihood of confusion is proper and must be maintained by the Board.

B. Registrant's Second Affirmative Defenses: Failure to State a Claim, Respectively.

An assertion of the affirmative defense of failure to state a claim is proper. In *Bell Atlantic Co. v. Twombly*, the Supreme Court held that in order to withstand a motion to dismiss, a plaintiff must plead sufficient facts in a complaint to allege "a plausible entitlement to relief." *550 U.S. 544,559 (2007).* In *Ashcroft v. Iqbal*, the Court clarified further that plaintiff's "complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *556 U.S. 662 (2009).*

Many courts have held that affirmative defenses are in fact not subject to the general pleading requirements for complaints as interpreted by the Supreme Court. It is worth noting, that the Court never referred to affirmative defenses in its rulings in *Twombly* and *Iqbal*. In the absence, therefore, of guidance from higher courts on the matter of pleading standards for affirmative defenses, the question as to whether to apply *Twombly* "is best resolved by reference to the text of the Federal Rules." *Enough for Everyone v. Provo Craft & Novelty,* SA CV 11-1161 DOC, 2012 WL 177576, *2 (C.D. Cal. Jan. 20, 2012). "[T]he sub-parts of the rule appear

to demand more from a party stating a claim for relief, i.e., the party stating a claim must *show* he or she is entitled to relief. In contrast, a party stating a defense need not *show* he or she is entitled to relief, but need only *state* any defense, and state each defense in short and plain terms." *Id*. Therefore, the heightened pleading standard in *Twombly* does not apply to affirmative defenses. *Id*.

Furthermore, when deciding *Twombly* the Supreme Court specifically noted the time and expense of allowing an action to proceed to discovery, and stated that when a plaintiff fails to plead sufficient facts in a Complaint to show a plausible entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly, 550 U.S. at 558 (quoting 5 WRIGHT AND MILLER, § 1216) (internal quotation marks omitted).* The concerns of preventing unfounded cases and wasting judicial resources as outlined in *Twombly* are not implicated by affirmative defenses. Moreover,

> "[t]o permit Plaintiff to prevail on [Motions to Strike Affirmative Defenses] would create two unacceptable results: 1) Plaintiffs would be encouraged to continue to file Motion to Strike in virtually every case where a Registrant had pleaded an affirmative defense even when the plaintiff could easily discern the bases for the defense; 2) Registrants would necessarily delay filing answers until discovery had permitted the factual pleading sought by plaintiffs. In the alternative, those Registrants would continually seek leave to amend and the Court's and parties' resources would be wasted. This course would also necessitate additional discovery and likely lengthen the time until a matter could brought to trial."

Schlottman v. Unit Drilling Co., LLC, No. Civ-08-1275-C, 2009 WL 1764855, *2 (W.D. Okla. June 18, 2009*)*.

What's more, Rule 12(f) motions are disfavored, "because striking of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001).* In light of this disfavored status of Rule 12(f) motions as vehicles for determining questions of fact or law before discovery

has taken place, it would be inappropriate for a court to strike pleadings prior to any discovery. Applying the heightened pleading standard to a Registrant's affirmative defenses would only encourage motions to strike, which is contrary to the well-established standard that such motions are strongly disfavored.

Finally, section 311.03(b) of the Trademark Trial and Appeals Board Manual says, "An answer may also include a short and plain statement of any defenses, including affirmative defenses that the Registrant may have to the claim or claims asserted by the plaintiff." This clear statement makes no mention of a higher standard of pleading affirmative defenses as requested by the Petitioner.

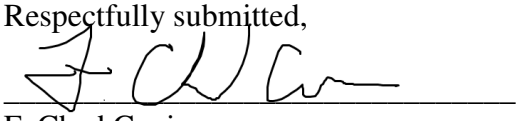
C. Conclusion

For these reasons we ask the board to deny Petitioner's motion as to strike the affirmative defenses. Alternatively, if the board is persuaded by the Plaintiff's motion as to either affirmative defense, we request the ability to amend our pleading accordingly.

WHEREFORE, for all the foregoing reasons, we ask that the Petitioner's motion to strike affirmative defenses be denied.

Dated: February 17, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the Answer to Amended Petition was delivered via email, fax, and deposited with the US Postal service to Petitioner's counsel David O. Johanson on February 17, 2015 at the following addresses/numbers.

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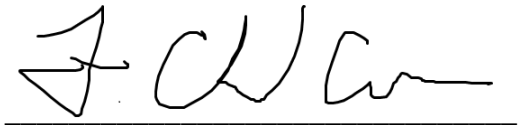

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